APPEAL NO. 010056

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 5, 2000. The hearing officer determined that the appellant (claimant) was not entitled to supplemental income benefits (SIBs) for the second and third compensable quarters because the claimant's underemployment was not a direct result of his impairment and that the claimant had not made a good faith effort to obtain employment commensurate with his limited ability to work.

The claimant appealed, contending both that he had returned to work in a position which was relatively equal to his ability to work and nonetheless, at least during the qualifying period for the third quarter, satisfied the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(5) and (e) (Rule 130.102(d)(5) and (e)). The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant had been employed as a typist/data entry operator. He developed de Quervain's syndrome and apparently, eventually, bilateral reflex sympathetic dystrophy (RSD). The hearing officer's Statement of the Evidence contains a detailed summary of the claimant's medical history. Although there are no stipulations or findings of fact on the background requirements, it appears undisputed that the claimant sustained a compensable bilateral wrist/hand injury on _____; that he has a 15% or greater impairment rating; and that impairment income benefits have not been commuted. The parties stipulated that the second quarter qualifying period began on December 23, 1999, and the third quarter qualifying period ended on June 21, 2000.

The claimant testified that initially he did not look for any work in the second qualifying period, relying on his treating doctor's reports taking him off work. In January of 2000, he applied for two jobs and was eventually hired at a sports bar beginning February 18 or 25, 2000. The claimant started working four hours on Friday of each week but this was reduced to three hours a week because of lack of available work rather than because of the claimant's inability to work. The claimant testified that Friday was the day deliveries were made to the bar and he would meet the route drivers who delivered supplies, check invoices, and show musical acts where to set up. The claimant earned $7.50 an hour and averaged $25.00 a week during the qualifying periods. The claimant made two other job contacts in the second quarter qualifying period. After the carrier denied SIBs for the second quarter, the claimant made some 20 or 21 job contacts beginning May 16, 2000, and continuing through June 21, 2000, the end of the qualifying period.

The claimant's treating doctor is Dr. G, who, in various reports, confirms the claimant's use of medication for his RSD, and states that he does not think the claimant

"will be able to gain and maintain meaningful employment." However, this is not a total inability to work case because two other doctors and a Texas Workers' Compensation Commission-ordered functional capacity evaluation performed on August 2, 2000, all indicate an ability to do at least light work. After the claimant obtained the job at the sports bar, Dr. G signed off on that job "on a trial basis." In a report dated May 11, 2000, Dr. G stated:

> [Claimant's] injury makes it very difficult to work in terms of his hands as he is unable to hold a pencil for any period of time, type for any period of time or hold a phone for any period of time. This would be greater than 10-15 minutes.

Eligibility criteria for SIBs entitlement are set out in Section 408.142(a) and Rule 130.102. Rule 130.102(d)(1) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has returned to work in a position which is relatively equal to the injured employee's ability to work. Rule 130.102(e) provides in part that, except as provided in subsection (d)(1), (2), (3), and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. The hearing officer recites the provision of the referenced rules, and comments that it appeared "that if more hours [of work] were available [claimant] would be willing and able to work more than half a day per week" and that there was nothing in the records where the claimant "was limited to working only 4 hours per week." The hearing officer went on to comment:

> Claimant was self limiting in his employment during the qualifying periods and his part-time employment did not meet the criteria set out under Rule 130.102(d)(1).

We agree with the claimant's contention that Rule 130.102(d) does not require the claimant to return to work in a position that is relatively equal to his ability to work and seek work each week of the qualifying period pursuant to Rule 130.102(e). The problem with that argument in this case is that the hearing officer found that the claimant was self-limiting in his employment and that his part-time employment was not relatively equal to his ability to work. The claimant cites Texas Workers' Compensation Commission Appeal No. 000776, decided May 30, 2000, and Texas Workers' Compensation Commission Appeal No. 000321, decided March 29, 2000; however, in those cases we affirmed a hearing officer's decision that the part-time employment was relatively equal to the employee's ability to work. Those cases do not require us to reverse the hearing officer's determination in this case where he made a factual determination to the contrary. The question of whether the claimant satisfied the good faith requirements of Rule 130.102(d) or 130.102(e) presented questions of fact for the hearing officer to resolve. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the

evidence. Section 410.165(a). We find the hearing officer's decision to be supported by the evidence.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Susan M. Kelley
Appeals Judge